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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 121.

WILLIAM FLASH, JOHN A. LEWIS, JAMES A. GIRDNER, AND LYDELL A. SAXON, COPARTNERS, UNDER THE FIRM NAME OF FLASH, LEWIS & CO., PLAINTIFFS IN ERROR,

vs.

ADNA C. CONN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

FILED OCTOBER 15, 1880.

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1 Pleas in the circuit court of the State of Florida for the first judicial circuit in and for the county of Escambia, in a certain cause wherein Wm. Flash, John A. Lewis, James A. Girdner, and Lydell A. Saxon, copartners doing business under the firm name of Flash, Lewis & Co., are plaintiffs, and Adna C. Conn is defendant.

Be it remembered that on the 27th day of January, in the year of our Lord one thousand eight hundred and seventy-six, came the plaintiffs in the case aforesaid, by their attorney, E. A. Perry, and filed in the clerk's office of the circuit court aforesaid their precipe for a summons ad respondendum, in the words and figures following, to wit:

Precipe.

First judicial circuit, circuit court Escambia County, State of Florida.

WM. FLASH, JOHN A. LEWIS, JAMES A. Girdner, and Lydell A. Saxon, copartners, doing business under the firm name of Flash, Lewis & Co., *v.* ADNA C. CONN.	Damages, $28,000.

The clerk of said court will please issue summons ad respondendum in above stated case, returnable to first Monday in February, A. D. 1876.

Jan'y 27th, 1876.

E. A. PERRY, *Pl'ffs' Att'y.*

2 Whereupon a summons ad respondendum issued from the clerk's office aforesaid, which, with the return and endorsements thereon, is in the words and figures following:

THE STATE OF FLORIDA:

Escambia County circuit court.

To the sheriff of said county, greeting:

We command you that you summons Adna C. Conn to appear before the hon. the judge of our circuit court for the county of Escambia, at a court to be holden at the court-house in the city of Pensacola, on the first Monday, being rule day, and the 7th day of February (1876) next, to answer the complaint of Wm. Flash, J. A. Lewis, et al., trading as Flash, Lewis & Co., in an action of assumpsit, damages claimed, $28,000. This you shall in no wise omit under the penalty of the law. And have you then and there this writ with your proceedings thereon.

Witness, R. A. Stearns, clerk of our said court, at the court-house aforesaid, this 27th day of January, A. D. 1876.

[SEAL.] R. A. STEARNS,
Clerk C't Court.

(Endorsed:) Flash, Lewis & Co. v. A. C. Conn. Sum. Filed January 29th, '76. R. A. Stearns, cl'k.

2116——1

Return.

Executed this 28th day of January, 1876, by delivering copy of within summons to Adna C. Conn, at his place of business, Molino, Escambia County, Florida.

3 A. M. GREEN, *Sheriff.*
GEO. E. WENTWORTH,
Deputy Sheriff.

And afterwards, to wit, on the 1st day of March, A. D. 1876, the plaintiffs, by their attorney, filed in the clerk's office aforesaid their declaration in the words and figures following, to wit:

Circuit court, first judicial circuit, State of Florida, Escambia County.
February rules, 1876.

WM. FLASH, JOHN A. LEWIS, JAMES A. GIRDner, and Lydell A. Saxon, copartners doing business under the firm name of Flash, Lewis and Co., plaintiffs,
v.
ADNA C. CONN, DEFENDANT.

William Flash, John A. Lewis, James A. Girdner, and Lydell A. Saxon, copartners doing business under the firm name of Flash, Lewis and Company, by E. A. Perry, their attorney, sue Adna C. Conn for $28,000:

For that said defendant, on and before the 1st day of April, 1874, was a stockholder in the Pensacola Lumber Company, a corporation formed in the State of New York, under the provisions of the act of the legislature of said State of New York, passed February seventeenth, 1848, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, chemical, &c., purposes," and the various amendments thereof, and the defendant being such stockholder and holding $75,000 of stock, or one-fourth of the stock, which was fixed at $300,000, and the said company doing business and having an agent and office in the said county, and the said company being indebted to the plaintiffs in the
4 sum of $5,000, by promissory note of Sept. 21st, 1874, and the sum of $5,946.20 by another promissory note of date Sept. 21st, 1874, and the further sum of $2,646.47 by account stated, copies of which notes and account are filed herewith and made part hereof, the said plaintiffs, on the 16th day of February, 1874, instituted their suit against the said company in this court to recover the sums due by said promissory notes and account, and the interest and costs. And on the 15th day of March, 1875, the plaintiffs in this court recovered judgement against the said company for the sum of $14,120.50, together with the costs of said suit, a transcript of which judgement is filed herewith and made part hereof; that by reason of the said company being adjudicated a bankrupt by the district court of the United States for the southern district of New York, on the day of , A. D. 1875, the plaintiffs were prevented from taking any of the property of the said company under execution in satisfaction of said judgement; that upon said judgement execution was duly issued,

but was returned by the sheriff of said county wholly unsatisfied; that the property of said company has been sold by order of said bankrupt court, and that the proceeds of said sale will not more than pay the costs and expenses of the bankrupt proceedings and of the assignee in bankruptcy, leaving nothing to be applied to satisfaction of said judgement or to be paid to the plaintiffs and other creditors, and that said judgement has not been and cannot be satisfied, either in whole or in part, out of the assetts of said company; that by the provisions of said act of the legislature of the State of New York all the stockholders of said company are severally individually liable to the creditors of the company to the amount of stock held by them respectively for all debts and contracts made by said company until the whole amount of capital stock, fixed and limited by such company, shall have been paid, and a certificate thereof shall have been made, signed, and sworn to by the president and a majority of the trustees, and recorded in the office of the county clerk of the county wherein the business of said company is carried on.

And the said plaintiffs aver that the said company failed to comply with the said provisions of said act, and did not, by its president and a majority of its trustees, make, sign, swear to and record such certificate, either in the county of New York, the county in which the operations of said company were by their articles to be carried on, and their principal business done, or in the county of Escambia, Florida, in which said company did their business, or in anywise as required by said act to exempt defendant. Whereupon the said defendant became and is liable to the said plaintiffs for the said debt, and said contract made by said company, and the said plaintiffs claim $28,000, and bring their suit.

E. A. PERRY, *Pl'ffs' Att'y.*

Attached to the declaration.

Pensacola Lumber Company, Molino, Florida, in a/c with Flash, Lewis and Co., of New Orleans.

1874.							
April	14th	Interest a/c to Sept. 21st, 1874		533 85	130		15 43
"	18th	To mdse		566 10	126		15 85
"	20th	" "		556 81	124		18 10
May	1st	" "		214 85	113		5 40
"	5th	" "	Interest after 30 days	411 82	109		9 96
"	16th	" "		751 96	98		16 38
"	18th	" "		221 24	96		4 71
"	21st	" "		85 83	93		1 76
"	23d	" "		642 25	91		12 98
"	25th	" "		35 54	89		69
6 May	29th	To mdse		444 27	85		8 39
"	3d	" "		331 87	80		5 88
June	6th	" "		354 31	77		6 06
"	12th	" "		269 63	71		4 44
"	16th	" "		123 12	67		1 85
"	18th	" "		450 81	65		6 59
"	22nd	" "		139 74	61		1 88
"	25th	" "		374 18	58		4 82
"	26th	" "		24 13	57		26
July	1st	" "		266 59	52		3 07
"	3d	" "		141 83	50		1 59
"	4th	" "		29 55	49		32
"	7th	" "		497 89	46		5 09
"	8th	" "		16 50	45		16
"	11th	" "		94 29	42		88
"	13th	" "		188 10	40		1 67
"	14th	" "		101 97	39		88
"	15th	" "		214 10	38		1 81
"	18th	" "		133 34	35		1 03
"	22nd	" "		357 07	31		2 46
"	25th	" "		180 22	28		1 12
"	27th	" "		6 20	26		03
"	30th	" "		10 00	23		05
August	3d	" "		315 58	19		1 33

Pensacola Lumber Company, Molino, Florida, in a/c with Flash, Lewis & Co., of New Orleans—Continued.

"	4th	" "		650 80	18	2 60
"	5th	" "		95 08	17	36
"	6th	" "		197 49	16	70
"	8th	" "		133 80	14	42
"	10th	" "		3 80	12	01
"	11th	" "		480 26	11	1 17
"	11th	" "		107 08	11	26
7 "	12th	" "		515 43	10	1 14
"	15th	" "		267 80	7	42
"	17th	" "		200 47	5	22
"	20th	" "		123 05	2	06
"	22nd	" "		640 85	2	06
"	25th	" "		19 87	2	06
"	26th	" "		477 85	2	06
"	28th	" "		385 03	2	06
"	31st	" "		447 31	2	06
September	2nd	" "		477 20	2	06
"	4th	" "		829 30	2	06
"	5th	" "		99 80	2	06
"	8th	" "		648 28	2	06
"	9th	" "		170 40	2	06
"	11th	" "		966 13	2	06
"	12th	" "		373 11	2	06
"	21st	" "	Bal. interest	80 34	2	06
				17, 572 15		169 99

CREDIT.

1874.					
June	8th	By overcharge on corn	6 30	105	14
"	20th	" cash	584 00	93	12 07
July	3d	" nett pro. note $3,000.00	2, 981 01	80	53 00
August	18th	" cash	2 49	34	02
"	15th	" nett pro. note $3,000.00	2, 971 81	37	24 42
September	21st	" " " " $5,000.00, @ 90 days	4, 895 56	.....	.....
"	21st	" " " " $5,946, @ 4 mo	5, 781 03	.....	.....
"	21st	Bal. interest	.....	.....	80 34
"	21st	Down	349 95	.....	.....
			17, 572 15	.....	169 99
1874.					
September	21st	To bal. due 21st September, '74	349 95	.....	.....

E. and O. E.

8 NEW ORLEANS, *February 10th*, 1875.

FLASH, LEWIS AND CO.

NEW ORLEANS, *February 10th*, 1875.

Pensacola Lumber Company, Pensacola, Florida, bo't of Flash, Lewis & Co., grocers, Nos. 38, 40, 42, & 44, Gravier street.

		To a/c current September 21st, 1874	.....	.....	349 95
September	8th	Cash paid f'r't	.....	4 20	4 20
"	25th	103 sacks corn chops, 14,743	95	250 10	
		75 " " W., 92.90	1 05	174 1	
		25 " oats, 39.15	75	91 75	
		15 bbls. flour, 44	8 25	123 75	
		20 " meal	4 50	90 00	
		15 " flour	7 00	105 00	
		1 bbl. cr. crack., 61	11½	7 01	
		1 cask b. sho., 1,225, 107, 1,118	12¼	136 95	
		1 " clear., 1,305, 105, 1,200	17½	210 00	
		1 tierce lard, 369, 58, 311	16½	51 31	
		1 furk. butter, gros' 122, 20, 102	43	43 86	
		1 bbl. white beans	.....	11 01	
		2 buckets tob., gold thread	8¼	16 50	
		3 sacks salt, C	135	4 05	
		1 t'rc' hams, palmetto, 395, 41, 354	16	56 64	
		1 bb'l c. oil, 44	21	9 24	
		4 cases "	260	10 40	
		5 gross matches	275	13 75	
		5 bales hay, 1, 680	29	24 36	
		½ M envelopes	250	1 25	
		1 ream note paper	.....	2 75	
		2 " straw "	90	1 80	

9	3 bbls. potatoes	4	12 00	
	1 bbl. onions		4 75	
	2 tce. coal	2 50	5 00	
	2 sacks bran, 348	1 35	4 65	
	Dray, $10.00; box, 50		16 50	
	Grinding 263½ bush., 10	10	26 33	
				1,498 88
September 29th	2 casks b. shoulders, 1235, 110, 2445, 2234, 1210, 101, 211	12	268 08	
	100 sacks w. corn, 12290	1 15	230 43	
	5 bbls. mess pork	26 75	133 75	
	Dray		4 40	
				636 66
September 30th	5 sacks salt, f	1 35	6 75	
	2 " bran, 330	1 35	4 45	
	1 doz. whitew. brushes		6 25	
	1 bbl. apples		6 00	
	1 box cheese, 45, 4, 41	17	6 97	
	Dray		40	
				30 82
October 6th	1 case axle-grease, 6	1 50	9 00	
	1 box tob, ch w, 1, 52	70	36 40	
	2 sacks coffee, P. B., 26, 266	23½	62 51	
	1 doz. currycombs		1 50	
	2 vials laudanum		3 50	
	1 bbl. w. beans		10 50	
	2 lbs. copper rivets, @		66	
	Drayage, 25: box, 25		50	
				124 57
	83 lbs. copper rivets, @ 75	2 25		
	Less amount charge	66	1 59	
				1 59
				2,646 67

10 $5,000.] NEW YORK, *Sept. 21st*, 1874.

Ninety days after date pay to the order of Flash, Lewis & Co. five thousand dollars, value received, and charge same to % of as advised.

JOHN D. GARDINER,
Manager Pensacola Lumber Co.

To NEHEMIAH KNIGHT, Esq.,
Treasurer Pensacola Lumber Co.,
107 *Franklin st., New York.*

(Endorsement on face of note:)
New York, Sept. 22d, 1874. Accepted. Payable at the Ninth National Bank, N. Y.

PENSACOLA LUMBER CO.,
NEHEMIAH KNIGHT, *Treasurer,*
By F. K. TROWBRIDGE, *Act'g.*

No. 112.

U. S. OF AMERICA,
State of New York:

I, Noel B. Sanborn, notary public in and for the State of New York, duly commissioned and sworn, do hereby certify that on the 23d day of Dec., 1874, at the request of holders thereof, the original instrument hereunto annexed was duly presented to a teller in charge at the Ninth National Bank, in the city of New York, and payment thereof was then and there demanded; which was refused.

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do solemnly and publicly protest, as well against the drawer, acceptors, and endorsers of said instrument as against all others whom it doth or may concern for exchange, re-exchange, and all other

costs, damages, and interest already incurred, or to be hereafter, for want of payment of the same.

This done and protested in the city of New York in the presence of John Doe and Richard Roe witnesses. Quod attested.

11 [SEAL.] N. B. SANBORN,
Notary Public.

Pensacola Lumber Co. for Flash, Lewis & Co. Protested 23d Dec., 1874. $5,000. Disbursements, .27; protest, 1.25—1.52.

$5,946.20.] NEW YORK, *Sept. 21st*, 1874.

Four months after date pay to the order of Flash, Lewis & Co. five thousand nine hundred and forty-six $\frac{20}{100}$ dollars, value received, and charge same to % of as advised.

JNO. D. GARDINER,
Manager Pensacola Lumber Co.

To NEHEMIAH KNIGHT, Esq.,
Treasurer Pensacola Lumber Co., 107 Franklin St't, New York.

(Endorsement on face of note:) New York, Sept. 22nd, 1874. Accepted. Payable at the Ninth National Bank, N. Y.

PENSACOLA LUMBER CO.,
NEHEMIAH KNIGHT, *Trea'r.*
F. N. TROWBRIDGE, *Act'g.*

No. 113.

U. S. OF AMERICA,
State of New York:

I, Noel B. Sanborn, notary public in and for the State of New
12 York, duly commissioned and sworn, do hereby certify that on the 23d day of January, A. D. 1875, at the request of the holders, the original instrument hereunto annexed was duly presented to the paying teller at the Ninth National Bank in the city of New York, and also to a person in the charge of the office of the Pensacola Lumber Co., Drexel Building, in said city, and payment thereof was then and there demanded, which was refused in each case.

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer, acceptor, and endorsers of the said instrument as against all others whom it doth or may concern for exchange, re-exchange, and all other costs, and damages, and interest already incurred or to be hereafter incurred for want of payment of the same.

This done and protested in the city of New York, in the presence of John Doe and Richard Roe, witnesses.

Quod attestee.

N. B. SANBORN,
Notary Public.

Pensacola Lumber Co. for Flash, Lewis & Co. Protested January 23d, 1875. $5,946.20. Protests and disbursements, $1.53.

STATE OF LOUISIANA,
City of New Orleans:

Personally appeared before the undersigned, a commissioner of the State of Florida in and for the State of Louisiana, duly commissioned and authorized by the executive authority of said State of Florida to take the acknowledgement and proof of the execution of deeds and other instruments in writing, and to administer oaths and affirmations to be used and
13 recorded in said State of Florida, James A. Girdner, of the firm of Flash, Lewis & Co., of said city of New Orleans, who, being by me first duly sworn, deposed that the annexed %, on which a balance is due of twenty-six hundred and forty-six $\frac{47}{100}$ dollars, and the two annexed promissory notes of the Pensacola Lumber Co., one for five thousand dollars, due Dec. 23d, 1874, and the other for fifty-nine hundred and forty-six and $\frac{20}{100}$ dollars, due January 24th, 1875, are due and correct; that the same as stated is just and true; that the same is a just claim; that nothing whatever has been paid or delivered toward the satisfaction of said accounts or notes, except what is credit*e*d therein; that there are no counter claims, credits, deductions, or offsetts known to affiant which has not been allowed, and that said sum of thirteen thousand five hundred and ninety-two and $\frac{87}{100}$ dollars justly claimed by and now due, owing, and remaining unpaid to said Flash, Lewis & Co. by and from Pensacola Lumber Co., of Molino, Florida, no part thereof having ever been paid or in any manner settled.

J. A. GIRDNER.

Sworn to and subscribed at my office in New Orleans this 10th day of February, A. D. 1875.

[SEAL.] ANDREW HERO,
Commissioner.

STATE OF LOUISIANA,
City of New Orleans:

James A. Girdner, being duly sworn, deposed and said that all the matters stated in the reverse hereof are true.

J. A. GIRDNER.

Sworn to and subscribed before me, the undersigned, a commissioner of the U. S., duly appointed, &c., by the circuit court of the United States for the district of Louisiana, this 10th day of February, A. D. 1875.

[SEAL.] (S'g.) ANDREW HERO,
Commissioner.

14 Written on the reverse side of the above written affidavit of J. A. Girdner.

P. K. YONGE.

Circuit court, State of Florida, Escambia County.

WILLIAM FLASH, JOHN A. LEWIS, JAMES A. Girdner, and Lydell A. Saxon, copartners doing business under the firm name of Flash, Lewis & Co., plaintiffs,
v.
THE PENSACOLA LUMBER COMPANY, DEFENDANTS. } Assumpsit.

This action having been commenced on the 16th day of February, 1875, and, after due and legal service, the defendant having failed to appear upon the return day, to wit, the first Monday of March, A. D. 1875, and default having been thereupon entered against the defendant, the said Pensacola Lumber Company, according to law and the rules of court: Now, this 15th day of March, A. D. 1875, came the plaintiffs, by their attorney, and upon application of plaintiffs, they having produced and filed such written instruments as form in part the cause of action, and the clerk having assessed the amount which the plaintiffs are entitled to recover for principal and interest upon such written instruments; and also having ascertained the amount which the plaintiffs are entitled to recover on the open account sued on from proofs by affidavit and otherwise; and having found that the plaintiffs are entitled to recover from the defendant in this action for their principal and interest to this date, thus assessed and ascertained, the sum of fourteen thousand one hundred and twenty-one dollar- and fifty-one cents:

It is therefore considered and adjudged by the court that the said plaintiffs, William Flash, John A. Lewis, James A. Girdner, and Lydell
15 A. Saxon, copartners, doing business under the firm-name of Flash, Lewis & Co., have and recover of and from the said defendant, the Pensacola Lumber Company, the said sum of fourteen thousand one hundred and seventy-one dollars and fifty cents, their damages thus assessed and ascertained, together with their costs in and about this suit expended, and that they have execution therefor.

(Sign') R. A. STEARNS,
Clerk C't Court.

MARCH 15TH, 1875.

(Endorsed:) Entered and filed this 15th day of March, 1875. R. A. Stearns, clerk.

And afterwards, to wit, on the 6th day of March, A. D. 1876, the defendant, by his attorney, entered his appearance herein in the words and figures following, to wit:

Circuit court Escambia County, State of Florida.

FLASH, LEWIS & CO.
v.
ADNA C. CONN.

The clerk of said court will please enter my name as appearing for the defendant in the above-stated case.

RICH'D L. CAMPBELL,
Att'y at Law.

And afterwards, to wit, on the 27th day of March, A. D. 1876, the defendant, by his attorney, filed his demurrer to the plaintiff's declaration in the words and figures following, to wit:

Circuit court, State of Florida, Escambia County.

FLASH, LEWIS & Co.
v.
A. C. CONN.

16 The defendant, by his attorney, R. L. Campbell, says that the declaration is bad in substance—

First. Because it does not set forth any cause of action.

Second. Because it does not set forth a cause of action cognisable by this court.

RICH'D L. CAMPBELL,
Defendant's Attorney.

I certify that, in my opinion, the foregoing demurrer is well founded.

RICH'D L. CAMPBELL,
Defendant's Attorney.

STATE OF FLORIDA,
Escambia County:

A. C. Conn, the defendant in the above case, being duly sworn, says that the above demurrer is not interposed for the purpose of delay.

A. C. CONN.

Sworn to and subscribed before me this 25th day of March, A. D. 1876.

R. A. STEARNS,
Clerk C't Court.

And afterwards, to wit, on the 2nd day of August, A. D. 1877, at a special term of Escambia County circuit court the following order was made:

FLASH, LEWIS & Co.
v.
A. C. CONN. } Assumpsit.

This case is, upon demurrer, under advisement, and the same stands continued.

A. E. MAXWELL, *Judge.*

17 And afterwards, to wit, on the 6th day of October, A. D. 1877, at a regular term of Escambia County circuit court, the following order was made:

FLASH, LEWIS & Co.
v.
A. C. CONN.

This case coming on to be heard upon the defendant's demurrer to the

plaintiffs' declaration, it is ordered and adjudged that the said demurrer be sustained.

A. E. MAXWELL, *Judge.*

And at another day, to wit, the sixth day of November, A. D. 1877, came the said plaintiffs by their attorney, and filed herein their order for a writ of error in the words and figures following, to wit:

First judicial circuit, State of Florida, Escambia County.

WILLIAM FLASH, JOHN A. GIRDNER, J. A. Lewis, and L. A. Saxon, copartners under firm name of Flash, Lewis & Co.,
v.
A. C. CONN.

In the above-stated case the clerk of said court will please issue writ of error to the hon. the judge of said court, returnable to the next term of the supreme court of the State of Florida, to be held at Tallahassee, on the 2nd Tuesday of January, A. D. 1878. The said clerk will also please issue to the said defendant, A. C. Conn, a sci. fa. ad audiendum errores, returnable with said writ.

18

E. A. PERRY,
Att'y for Pl'ffs.

And on the same day last named, the said 6th day of November, A. D. 1877, came the said plaintiffs, and filed their bond for writ of error in the words and figures following, to wit:

Circuit court, Escambia Co., State of Florida, first judicial circuit.

Know all men by these presents that we, William Flash, John A. Lewis, James A. Girdner, and L. A. Saxon, composing the firm of Flash, Lewis & Co., and M. G. Yuiestra, are held and firmly bound unto A. C. Conn in the sum of two hundred dollars, for the payment whereof well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Signed and sealed this 6th day of November, A. D. 1877.

The condition of this obligation is such that whereas the said circuit court, on the 6th day of October, A. D. 1877, in a cause in which the above bounden Flash, Lewis & Co. were plaintiffs and the said A. C. Conn was defendant, rendered a judgment in favor of said defendant upon his demurrer to said plaintiffs' declaration, and the said plaintiffs being dissatisfied therewith, and complaining that in the record and proceedings, as also in the rendition of the said judgment, manifest error hath happened, and have demanded a writ of error to the said circuit court, returnable to the next term of the supreme court of the State of Florida, to be held at Tallahassee, on the second Tuesday of January, A. D. 1878: Now, if the said plaintiffs, the said Flash, Lewis & Co., shall well and truly pay all the costs which may accrue in the prosecution of said writ if error if the

said judgement *if* the said circuit court shall be affirmed, then this obligation to be void; else to remain in full force and virtue.

19 WM. FLASH, [SEAL.]
JOHN A. LEWIS, [SEAL.]
J. A. GIRDNER, [SEAL.]
L. A. SAXON, [SEAL.]
M. G. YUIESTRA, [SEAL.]
By their attorney in fact, E. A. PERRY.

Approved Nov. 6th, 1877.

F. E. DE LA RUA,
Clerk C't Court.

And afterwards, on the 11th day of April, A. D. 1878, came the said plaintiffs, by their attorney, and filed herein the mandate of the supreme court of Florida, which is in the words and figures following, to wit:

Mandate from supreme court, State of Florida.

To the hon. the judge of the circuit court for the first judicial circuit of Florida, greeting:

Whereas lately in the circuit court of the first judicial circuit of Florida, in and for the county of Escambia, before you, in a cause wherein Flash, Lewis & Co, were plaintiffs and Adna C. Conn was defendant, the judgement of the court was in the following words, to wit: "This case coming on to be heard upon the defendants' demurrer to the plaintiffs' declaration, it is ordered and adjudged that the said demurrer be sustained." As by the inspection of the transcript of the record of the said circuit court, which was brought into the supreme court by virtue of a writ of error, agreeably to the laws of said State in such case made and provided, fully and at large appears; and whereas at the regular January term of said supreme court, holden at Tallahassee, A. D. 1878, the said cause came on to be heard before the said supreme court on the transcript of the record, and was argued by counsel, in consideration whereof it was consid-

20 ered by said supreme court that the said judgement is reversed, and that judgement be entered in the court below in favor of the plaintiffs upon the demurrer; and that the plaintiffs in error do recover of the defendant in error their costs by them in this behalf expended, taxed at the sum of sixteen and $\frac{58}{100}$ dollars:

Therefore you are hereby commanded that such further proceedings be had in said cause as according to right, justice, the judgement of said supreme court, and the laws of the State of Florida ought to be had, the said sentance of the court below notwithstanding.

Witnesss the honorable Edwin M. Randall, chief justice of said supreme court, at Tallahassee, this 6th day of April, A. D. 1878.

[SEAL.] C. H. FOSTER,
Clerk Supreme Court, Florida,
By W. F. QUAILE, *D. C.*

And afterwards, to wit, on the said 11th day of July, 1878, came the said plaintiffs, by their attorney, and filed herein their motion and notice to defendant in the words and figures following, to wit:

Circuit court, Escambia County.

FLASH, LEWIS & CO.
v.
A. C. CONN.

The plaintiffs move to amend the entry made herein October 6th, 1877, and that there be entered in the minutes of the court now for the 6th day of October, A. D. 1877, the following:

"This case coming on to be heard upon the defendant's demurrer to the plaintiffs' declaration, it is, this 6th day of October, 1877, ordered and adjudged that the said demurrer be sustained, and the plaintiffs not
21 applying for leave to plead over it is considered by the court that said cause be dismissed, and that the defendant have and recover of and from the plaintiffs his costs in this behalf expended."

July 11th, 1878.

E. A. PERRY, *Pl'ffs' Att'y.*

To R. L. CAMPBELL, Esq.,
Att'y for Def't:

Please take notice that I have entered motion upon the motion docket of which above is copy, and will ask the court to consider the same tomorrow, or at such other time as the court will hear the same.

July 11th, 1878.

E. A. PERRY, *Pl'ffs' Att'y.*

(Endorsed:) Copy of this sent to Mr. Campbell by J. C. Avery, esq., July 11th, 1878. E. A. P.

And afterwards, to wit, on the 18th day of July, A. D. 1878, at a special term of Escambia County circuit court, the following order was made herein.

WILLIAM FLASH, JOHN A. LEWIS, JAMES A. Girdner, and Lydell A. Saxon, copartners, doing business under the firm-name of Flash, Lewis & Co.,
v.
A. C. CONN.
} Assumpsit.

In obedience to the mandate of the supreme court the judgement of this court heretofore entered sustaining defendant's demurrer is reversed. And it is considered by the court that the said demurrer be, and the same is hereby, overruled, and upon defendant's application he is allowed
22 to plead to the declaration within thirty days, and case continued.

A. E. MAXWELL, *Judge.*

And afterwards, to wit, on the 16th day of August, A. D. 1878, came the said defendant by his attorney, and filed herein his pleas in the words and figures following, to wit:

In the circuit court, State of Florida, Escambia County.

WILLIAM FLASH, JOHN A. LEWIS, JAMES A. Girdner, and Lydell A. Saxon, copartners, doing business under the firm-name of Flash, Lewis & Co.,

v.

ADNA C. CONN.

First. For plea to the plaintiffs' declaration, the defendant says that by the statutes of the State of New York, referred to in the plaintiffs' declaration, it is provided that no stockholder of any company created thereunder shall be liable for the payment of any debts of said company, unless a suit for the collection of said debt shall have been brought against such company within one year after the debt shall have been due; and this defendant avers that no suit for the collection of the debts mentioned in the plaintiffs' declaration has been commenced in the said State of New York, although more than a year has elapsed since the same became due and payable, and this the defendant is ready to verify, &c.

R. L. CAMPBELL,
Defendant's Attorney.

Second. And for a further plea in this behalf, the defendant says that the said corporation, The Pensacola Lumber Company was created
23 on 8th December, 1865, under the statute of the State of New York referred to in plaintiffs' declaration; that all its capital stock was paid in within a year after its formation; that this defendant did not become a stockholder of said corporation until about 18th of April, 1872; and that the provisions of the statute of New York in relation to making and filing a certificate in the county court, as set forth in plaintiffs' declaration, has no application to defendant or other stockholders except such as were stockholders within two years from the date of the formation of said corporation, and this the defendant is ready to verify, &c.

RICH'D L. CAMPBELL,
Defendant's Attorney.

And for a further plea in this behalf the defendant says that the original capital stock of said Pensacola Lumber Company was 75,000 dollars, all of which was paid up in full; *the defendant* that defendant was the holder and owner of one-fourth thereof, 18,750 dollars; that he has paid debts of said corporation over and above that sum, and this he is ready to verify, &c.

RICH'D L. CAMPBELL,
Defendant's Attorney.

Fourth. And for further plea in this behalf the defendant says he did not become a stockholder of said Pensacola Lumber Company until five years after the lapse of the period of two years and thirty days from the formation thereof, within which said period said certificate of payment of the capital stock referred to in plaintiffs' declaration should have been filed in the office of the county clerk of New York County, and therefore the plaintiffs are barred of all right of action against this defendant

founded on an omission, if any, to file said certificates, and this the defendant is ready to verify.

24 Fifth. And for a further plea in this behalf the defendant says that it is provided in and by the statutes of the State of New York referred to in said declaration that no stockholder of any company formed thereunder shall be personally liable for the payment of any debt created by such company until an execution against said company issued by a court of said State shall have been returned unsatisfied in whole or in part, and the said defendant says that no such execution was ever issued by or under the authority of any court of the said State and returned unsatisfied, and this the defendant is ready to verify, &c.

RICH'D L. CAMPBELL,
Attorney for Defendant.

STATE OF FLORIDA,
Escambia County:

A. C. Conn, within-named defendant, being duly sworn, says that the within pleas are true to the best of his knowledge and belief.

A. C. CONN.

Sworn to and subscribed before me this 15th day of August, A. D. 1878.
O. M. AVERY, *County Judge.*

And afterwards, to wit, on the 28th day of August, A. D. 1878, came the said plaintiffs, by their attorney, and filed herein their demurrers and replications to defendant's pleas in the word' and figures following, to wit:

Circuit court, State of Florida, Escambia County.

FLASH, LEWIS & CO.
v.
A. C. CONN.

Plaintiffs demur to defendant's first plea, and says for cause:

25 that the said plea does not state facts sufficient to constitute a defense. It does not appear by said plea that there is any statute of the State of New York which requires suit to have been brought against the company in the State of New York within one year after the debt became due.

Plaintiffs demur to defendant's second plea, and say for cause: that the said plea does not state facts sufficient to constitute a defense. And that said plea is insufficient in divers respects.

Plaintiff's reply to defendant's third plea, and for replication say: that before the making of the contracts, and creating the indebtedness, the causes of action here, to wit, in January, 1874, the said Pensacola Lumber Company increased the capital stock to a much greater sum than $76,000, to wit, $300,000, of which the defendant was the holder and owner of one-fourth or $75,000, and that defendant has not paid debts of said corporation for that last-mentioned sum.

Plaintiffs demur to defendant's fourth plea, and say for cause: that the said plea does not state facts sufficient in law to constitute a defense.

Plaintiff's reply to defendant's fifth plea, and for replication say: there is

no statute of New York referred to in said declaration or otherwise, which provides that no stockholder of any company formed thereunder shall be personally liable for the payment of any debt contracted by such company until an execution is issued by a court of the State of New York, shall have been returned unsatisfied in whole or in part in manner and form as alleged in defendant's said plea.

E. A. PERRY,
Plaintiffs' Attorney.

E. A. Perry, counsel for the plaintiffs, hereby certify that in my
26 opinion the foregoing demurrers are well founded in law. And I make affidavit that the same are not interposed for delay.

Subscribed and sworn before me this 28th day of August, A. D. 1878.
F. E. DE LA RUA,
Clerk C't Court.

And on the same day last named, the said 28th day of August, A. D. 1878, came the said plaintiffs, and filed herein notice to defendant of submission to the Hon. A. E. Maxwell, judge of said court, of plaintiffs' demurrers to defendant's first, second, and fourth pleas, in the words and figures following, to wit:

(NOTE BY CLERK.—This notice blended with it several other cases.)

Circuit court, Escambia County, State of Florida.

FLASH, LEWIS & CO.)
v.)
A. C. CONN.)

To R. L. Campbell, esq., attorney for defendant in above cases:

SIR: Please take notice that plaintiffs' demurrers to defendant's first, second, and fourth pleas, pleaded in each of above-stated cases, will be submitted to the Hon. A. E. Maxwell, judge of said court, to be by him determined at the clerk's office on Monday, the 2nd day of September, A. D. 1878, at 11 o'clock a. m., or as soon thereafter as same can be heard.

E. A. PERRY,
Plaintiffs' Attorney.

AUGUST 28TH, 1878.

27 And afterwards, to wit, on the 2nd day of September, A. D. 1878, came the said defendant, by his attorney, and filed herein his petition for removal of said case to the circuit court of the United States for the northern district of Florida, at Pensacola, and also filed his bond for removal in the words and figures following, to wit:

In the circuit court of the first judicial circuit of the State of Florida in and for Escambia County.

To the Hon. A. E. Maxwell, judge of said court:

The petition of Adna C. Conn respectfully represents to your honor

that he is a citizen of the State of Florida; that an action has been brought against him in this court by William Flash, John A. Lewis, Thomas A. Girdner, and Lydell A. Saxon, copartners *until* the style of Flash, Lewis & Co., and that the said plaintiffs are citizens of the State of Louisiana; that the amount in controversy in said action is more than 15,000 dollars. And that your petitioner, under the act of Congress of 3d of March, 1875, prays that the said action may be removed into the circuit court of the United States for the northern district of Florida, at Pensacola.

And your petitioner will ever pray, &c.

ADNA C. CONN,
By his attorney, RICHARD L. CAMPBELL.

Know all men by these presents that we, Adna C. Conn, Thomas Morgan, and Daniel F. Sullivan are held and firmly bound unto William Flash, John A. Lewis, James A. Girdner, and Lydell A. Saxon, copartners under the style of Flash, Lewis & Co., in the sum of two hundred and fifty dollars, for the payment of which well and truly to
28 be made we bind ourselves, jointly and severally, firmly by these presents. Given under our hands and seals this 2nd day of September, A. D. 1878.

The condition of the above obligation is such that whereas the said Adna C. Conn has petitioned for the removal of a cause wherein he is defendant and the said William Flash, John A. Lewis, James A. Girdner, and Lydell A. Saxon, under the style of Flash, Lewis & Co. are plaintiffs, from the circuit court for Escambia County, State of Florida, to the circuit court of the United States for the northern district of Florida, under the act of Congress of 3d March, 1875.

Now, therefore, if the said Adna C. Conn shall enter in said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and pay all costs that may be awarded by the said circuit court of the United States if said circuit court shall hold such suit was wrongfully or improperly removed thereto, then this obligation to be void; else to remain in full force and virtue.

A. C. CONN. [SEAL.]
THOMAS MORGAN. [SEAL.]
D. F. SULLIVAN. [SEAL.]

Approved.

A. E. MAXWELL, *Judge.*

And afterwards, to wit, on the 19th day of February, A. D. 1879, came the said defendant by his attorney, and filed herein his petition for removal of said case to the circuit court of the United States for the northern district of Florida, at Pensacola, and also filed his bond for removal, and which petition and bond are in the words and figures following, to wit:

In the circuit court of the first judicial circuit of the State of Florida, in and for the county of Escambia.

29 WILLIAM FLASH, JOHN A. LEWIS, Thomas A. Girdner, and Lydell A. Saxon, coparcners, under the style of Flash, Lewis & Co., plaintiffs,
v.
ADNA C. CONN, DEFENDANT. } Assumpsit.

The petition of Adna C. Conn, the defendant in the above-stated case, respectfully shows unto your honor: That your petitioner is, and was at the commencement of said suit, a citizen of the State of Florida, and that the said plaintiffs were at the commencement of said suit, and are at this time, citizens of the State of Louisiana.

That the amount in controversy in said case is more than 15,000 dollars, besides costs.

And your petitioner therefore prays that said suit may be ordered by this court to be removed to the circuit court of the United States for the northern district of Florida, at Pensacola, under the second and third sections of an act of Congress "To determine the jurisdiction of the courts of the United States and to regulate the removal of causes from the State courts, and for other purposes," approved March 3d, 1875.

RICH'D L. CAMPBELL,
Attorney for Petitioner.

STATE OF FLORIDA,
Escambia County:

A. C. Conn, the above-mentioned petitioner, being duly sworn, says that the facts set forth in the foregoing petition are true.

A. C. CONN.

Sworn to and subscribed before me this 6th day of February, A. D. 1879.

O. M. AVERY,
County Judge.

30 Know all men by these presents that we, Adna C. Conn, Thomas Morgan, and Joseph Vaughn, are held and firmly bound unto William Flash, John A. Lewis, James A. Girdner, and Lydell A. Saxon, copartners, under the style of Flash, Lewis & Co., in the sum of two hundred and fifty dollars, for the payment of which well and truly to be made we bind ourselves, jointly and severally, firmly by these presents. Given under our hands and seals this 6th day of February, A. D. 1879.

The condition of the above obligation is such that whereas the said Adna C. Conn has petitioned for the removal of a case wherein he is defendant, and the said William Flash, John A. Lewis, James A. Girdner, and Lydell A. Saxon, under the style of Flash, Lewis & Co., are plaintiffs, from the circuit court for Escambia County, State of Florida, to the circuit court of the United States for the northern district of Florida, at Pensacola, under the act of Congress of the 3d of March, 1875.

Now, therefore, if the said Adna C. Conn shall enter in said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and pay all costs that may be awarded by the said circuit court of the United States if said circuit court shall hold such suit was wrongfully or improperly removed thereto, then this obligation to be void; else to remain in full force and virtue.

A. C. CONN. [SEAL.]
THOMAS MORGAN. [SEAL.]
J. B. VAUGHN. [SEAL.]

Approved February 15th, 1879.

A. E. MAXWELL, *Judge*.

And thereupon, on the 15th day of February, A. D. 1879, and bearing date of filing the 19th day of February, A. D. 1879, the following order was made herein:

31 Circuit court, State of Florida, Escambia County. At chambers.

Upon reading the foregoing petitioner, and it appearing that the said petitioner, Adna C. Conn, has given bond as required by the 3d section of the act of Congress mentioned in said petition—

It is ordered that the above-stated case be, and the same is hereby, removed to the circuit court of the United States for the northern district of Florida, at Pensacola.

February 15th, 1879.

A. E. MAXWELL, *Judge*.

STATE OF FLORIDA,
Escambia County:

I, F. E. de la Rua, clerk of the circuit court in and for the county of Escambia, first judicial circuit of Florida, do hereby certify that the foregoing pages, numbered from one to thirty-five, inclusive, constitute a true copy of all the proceedings and a correct transcript of the record in the case of William Flash, John A. Lewis, James A. Girdner, and Lydell A. Saxon, copartners, under the style of Flash, Lewis and Co., plaintiffs, and Adna C. Conn, defendant, as appears upon the files and records of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 20th day of February, A. D. 1879.

[SEAL.] F. E. DE LA RUA,
Clerk Circuit Court for the County of Escambia.

32 (Endorsement on record:) Flash, Lewis & Co. v. A. C. Conn. Transferred from Escambia County circuit court to United States circuit court. Filed March 3d, 1879. George E. Wentworth, clerk.

Proceedings begun and had in the circuit court of the United States, fifth judicial circuit, northern district of Florida, at Pensacola, in a cause removed by petition from the circuit court of Escambia County, first judicial circuit, State of Florida, wherein William Flash, John A. Lewis, James A. Girdner, and Lydell A. Saxon, copartners, doing business under the firm-name of Flash, Lewis & Co., are plaintiffs, and Adna C. Conn is defendant.

In the circuit court of the United States, fifth circuit, northern district of Florida, at Pensacola.

33 FLASH, LEWIS & CO. }
v.
A. C. CONN. }

And the said defendant, for a rejoinder to the said plaintiffs' replication to the defendant's third plea, says that it is true the capital stock of said corporation was increased to the sum of $300,000 as alleged in said replication, but that upon an increase of the capital stock of corporations under the statute of New York in the plaintiffs' declaration mentioned, the only certificate required to be made and filed in the office of the county clerk, is one showing the proceedings of the meeting of the stockholders to effect such increase, the amount of capital stock paid in, the business to which such corporation is extended or changed, the whole amount of debts and liabilities of the company, and the amount to which the capital stock shall be increased or diminished made out, signed and verified by the affidavit of the chairman, countersigned by the secretary, and acknowledged by the chairman; and the defendant avers such certificate was made and filed when required by said statute in the office of the county clerk of New York County, in the State of New York, where it was required to be filed, and also in the office of the secretary of state of the State of New York where it was also required to be filed. And said defendant further avers that the full amount of said increased stock was afterwards fully paid up, that the said increase of the capital stock of said corporation was made and paid up, and said certificates filed, as hereinbefore stated, long before the said corporations incurred the debts to the plaintiffs in their said declaration mentioned; and that it appears in and by said certificate as was the fact, that all the original capital stock of $75,000 was fully paid
34 up; and this the defendant is ready to verify. Whereupon he prays judgement, &c.

RICH'D. L. CAMPBELL.
Defendant's Attorney.

(Endorsements:) U. S. circuit court, fifth judicial circuit, northern district of Florida. Flash, Lewis & Co. v. A. C. Conn. Rejoinder. Filed March 3d, 1879. Geo. E. Wentworth, clerk.

In the circuit court of the United States, fifth judicial circuit, northern district of Florida, at Pensacola.

FLASH, LEWIS & CO. }
v.
A. C. CONN. }

Sixth plea: And for a further plea to the plaintiffs' declaration the de-

fendant says that a large amount of debts besides that of the plaintiffs in their said declaration mentioned is due to other creditors of said corporation and exceeding the defendant's ability to pay, and this he is ready to verify. Whereupon he prays judgement, &c.

35 RICH'D L. CAMPBELL,
Attorney for Defendant.

STATE OF FLORIDA,
Escambia County:

A. C. Conn, the defendant in the above case, being duly sworn, says the above plea is true.

A. C. CONN.

Sworn to and subscribed before me this 4th day of March, A. D. 1879.
GEO. E. WENTWORTH, *Clerk.*

(Endorsement:) United States circuit court, fifth judicial circuit, northern district of Florida. Flash, Lewis & Co. v. A. C. Conn. Plea. Filed March 6th, 1879. Geo. E. Wentworth, clerk.

Circuit court of the United States for northern district of Florida, at Pensacola.

36 FLASH, LEWIS & CO.
v.
A. C. CONN.

Plaintiffs demur to defendant's rejoinder to plaintiffs' replication to defendant's third plea, and for grounds say:

The said rejoinder does not state facts sufficient to constitute a rejoinder to said replication.

It does not traverse or in anywise avoid said replication.

It presents an immaterial issue, and is in other respects bad and insufficient in law.

Plaintiffs demur to defendant's further plea sixth, filed herein March 6th, 1879, and for grounds say, the same does not state facts sufficient to constitute a defense, and is otherwise bad and insufficient in law.

E. A. PERRY,
Plaintiffs' Attorney.

UNITED STATES OF AMERICA,
Northern District of Florida:

I, E. A. Perry, counsel for plaintiffs, hereby certify that in my opinion the foregoing demurrers are well founded in law; and the said plaintiffs being out of State, I make affidavit that the said demurrers are not interposed for delay.

E. A. PERRY,
Plaintiffs' Attorney.

Sworn to before me this 12th day of March, 1879.
GEO. E. WENTWORTH, *Clerk.*

37 (Endorsements:) Flash, Lewis & Co. v. A. C. Conn. Plaint-

iffs' demurrer to defendant's rejoinder to third replication and demurrer to further plea, filed March 6th, 1879. Filed March 12th, 1879. Geo. E. Wentworth, clerk. E. A. Perry, plaintiffs' attorney.

United States circuit court, fifth judicial circuit, northern district of Florida, at Pensacola.

FRIDAY, *March 14th*, 1879.

Court met this day at 10 o'clock a. m., pursuant to adjournment.

Present, honorable William B. Woods, judge fifth judicial circuit, and honorable Thomas Settle, judge United States district court.

FLASH, LEWIS & CO. }
v. } Assumpsit. Cause removed from State court.
A. C. CONN. }

38 This cause coming on to be heard upon the plaintiffs' demurrers to the defendant's first, second, fourth, fifth, and sixth pleas, and the rejoinder to the replication to the third plea, and the argument not having been concluded at the hour of adjournment of the court, the same was postponed until the following day.

Ordered, that this court adjourn until Saturday, March 15th, at 4 o'clock p. m.

SATURDAY, *March 15th*, 1879.

Court met this day at 4 o'clock p. m., pursuant to adjournment.

Present, honorable William B. Woods, judge fifth judicial circuit, and honorable Thomas Settle, judge United States district court.

FLASH, LEWIS & CO. }
v. } Assumpsit.
A. C. CONN. }

Now, on this day the argument of counsel in this cause, which was adjourned from yesterday, was resumed; and, having been concluded, the court took the same under consideration in order to determine upon its judgement.

Ordered, that this court adjourn until Tuesday, March 18th, 1879, at 10 o'clock a. m.

39 United States circuit court, fifth judicial circuit, northern district of Florida. March term, 1880.

THURSDAY, *March 18th*, 1880.

Court met at 10 o'clock a. m., pursuant to adjournment.

Present, honorable Thomas Settle, judge presiding.

FLASH, LEWIS & CO. }
v. }
A. C. CONN. }

This cause came on to be heard at the March, 1879, term of the court

upon the plaintiffs' demurrers to defendant's first, second, fourth, fifth, and sixth pleas, and to defendant's rejoinder to plaintiffs' replication to defendant's third plea; and the court having heard argument of counsel took the same under advisement, and now having determined that the plaintiffs' declaration is insufficient at law it is therefore considered by the court that the plaintiffs take nothing by their said suit, and that the defendant have and recover his costs of suit, and that execution issue therefor.

It is ordered that this court adjourn until to-morrow, Friday, March 19th, at 10 o'clock a. m.

And afterwards, to wit, on the 19th day of March, A. D. 1880, came the plaintiffs by their attorney, E. A. Perry, esq., and filed their bond for a writ of error in words and figures following:

40 Know all men by these presents that we, William Flash, John A. Girdner, and Lydell A. Saxon, copartners under the firm-name of Flash, Lewis & Co., and F. C. Brent, are held and firmly bound unto Adna C. Conn in the full and just sum of five hundred dollars to be paid to the said Adna C. Conn, his executors or administrators, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 19th day of March, A. D. 1880.

Whereas lately, to wit, on the 18th day of March, instant, at a term of the circuit court of the United States for the northern district of Florida in a suit depending in said court between the said Flash, Lewis & Co., plaintiffs, and the said Adna C. Conn, defendant, judgement was rendered against the said plaintiffs, and that said defendant recover his costs in said suit; and whereas the above-named William Flash, John A. Lewis, James A. Girdner, and Lydell A. Saxon, copartners under the firm-name of Flash, Lewis & Co., have prosecuted a writ of error to the Supreme Court of the United States to reverse said judgement:

Now therefore the condition of this obligation is such that if the above-named Flash, Lewis & Co. shall prosecute their said writ of error to effect and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

WILLIAM FLASH, [SEAL.]
JOHN A. ADAMS, [SEAL.]
JAMES A. GIRDNER, [SEAL.]
LYDELL A. SAXON, [SEAL.]

41, 42 By their attorney in fact, E. A. PERRY.
F. C. BRENT. [SEAL.]

Sealed and delivered in presence of, and approved by—
THOMAS SETTLE, *Judge.*

(Endorsements:) Flash, Lewis & Co. v. Adna C. Conn. Writ of error. Bond. Filed March 19th, 1880. Geo. E. Wentworth, clerk.

43 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Florida, greeting:

Because in the record and proceedings, and also in the rendition of

the judgement of a plea which is in the said circuit court before you, between William Flash, John A. Lewis, James A. Girdner, and Lydell A. Saxon, copartners under the firm-name of Flash, Lewis, & Co. and Adna C. Conn, a manifest error hath happened to the great damage of the said William Flash, John A. Lewis, James A. Girdner, and Lydell A. Saxon, copartners under the firm-name of Flash, Lewis & Co. as by their complaint appears, we being willing that the errors, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgement be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the
44, 45 said Supreme Court the 19th day of March, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] GEORGE E. WENTWORTH,
Clerk of the Circuit Court for the Northern District of Florida.

46 (Indorsed:) United States circuit court, fifth judicial circuit, northern district of Florida. Flash, Lewis & Co. vs. A. C. Conn. Writ of error. Issued March 19th, 1880.

47 The United States of America to Adna C. Conn, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Florida, at Pensacola, wherein William Flash, John A. Lewis, James A. Girdner, and Lydell A. Saxon, copartners under the firm of Flash, Lewis & Co., are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the
48 said Supreme Court of the United States, this 19th day of March, in the year of our Lord one thousand eight hundred and eighty.

THOMAS SETTLE,
Judge of District Court for Northern District of Florida, setting as Judge of the Circuit Court for said District.

[SEAL.] Attest: GEO. E. WENTWORTH, *Clerk.*

Office clerk United States circuit court, fifth judicial circuit, northern district of Florida, at Pensacola.

On this sixth day of July, in the year of our Lord one thousand eight hundred and eighty, personally appeared before me, the subscriber, William Fisher, and made oath that he delivered a true copy of the within citation to Richard L. Campbell, attorney of record for Adna C. Conn.

WM. FISHER.

49 Sworn and subscribed before me this 6th day of July, A. D. 1880.

GEORGE E. WENTWORTH,
Clerk.

50 (Indorsed:) Flash, Lewis & Co. vs. Adna C. Conn. Citation. Filed March 19th, 1880. Geo. E. Wentworth, clerk.

51 *Cost bill.*

FLASH, LEWIS & CO.
v.
ADNA C. CONN.

Transferred from Escambia County circuit court.—Transcript filed March 3d, 1879.

Filing & ent'g transcript, 20; filing & ent'g appearance, 20; filing & ent'g rejoinder, 20	60
Filing & ent'g def't's 6th plea, 20; oath, jurat, & seal, 45; filing & ent'g demurrer to rejoinder, 20	85
Oath, jurat, & seal, 45; affidavit & seal, 45; filing & ent'g interrogatories & cross, 40	1 30
Issuing commission & seal, 1.45; copy instructions, 5 fls., 75; filing & ent'g depositions, 20	2 40
Ent'g order publication, 1 f., 15; publishing, 20; depo. Stork & Wing & copy interrogatories for def't, 8 fl., 1.20	1 55
Same charges on depositions in case two other witnesses, 4.45	4 45
Docket & indexes, 3.00; taking & app'g security, 50; filing bond, 10; filing & ent'g clerk & mar's bills, 20	3 80
Certif. copy judgement, 50; ent'g judgement, 2 fs., 30; filing & ent'g opinion, 20; writ of error, 1.20	2 20
Copy, 75; cert'f., 15; seal, 20; citation, 1.20; copy, 75; cert'f., 15; seal, 20; filing & ent'g returns, 40	3 80
Record for Supreme Court, 34.93; certificate, 45; seal, 20	35 58
	$56 53
Attorney's tax fee	10 00
	$66 53

Taxed at sixty-six and $\frac{53}{100}$ dollars.

GEORGE E. WENTWORTH,
Clerk.

52 I, George E. Wentworth, clerk of the United States circuit court, fifth judicial circuit, northern district of Florida, at Pensacola, Florida, do hereby certify that the foregoing pages, numbered from one to fifty-one, inclusive, contains a true and correct copy of the transcript of proceedings had in the circuit court of the first judicial circuit, Escambia County, filed in my office in a cause in which Flash, Lewis & Co. are plaintiffs and Adna C. Conn is defendant; and also a transcript of proceedings had in the United States circuit court, fifth judicial circuit, northern district of Florida, in the same cause, together with the original writ of error and citation with service thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of the court, at Pensacola, Florida, this twenty-first day of July, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] GEORGE E. WENTWORTH,
Clerk.

53 United States circuit court, fifth judicial circuit, northern district of Florida, Pensacola, March term, 1880.

And now, on this 18th day of March, A. D. 1880, the following opinion was filed in the office of the clerk of the United States circuit court at Pensacola, Florida:

FLASH, LEWIS & CO.
v.
A. C. CONN.

The declaration alleged that the defendant, on and before the first day of April, 1874, was a stockholder in the Pensacola Lumber Company, a corporation formed in the State of New York under an act of the legislature of that State, passed February 17th, 1848, entitled "An act to authorize the formation of corporations for manufacturing, mining, &c., purposes;" that the said company did business, and had an office and an agent, in Escambia County, in the State of Florida; that the defendant was the holder of stock in said company to the amount of $75,000, the entire stock of the company being $300,000; that the said company, while the defendant was the holder of the stock aforesaid, became largely indebted to the plaintiffs, which indebtedness was evidenced by promissory notes and open account—whereupon the plaintiffs, on February 16th, 1874, instituted their suit in the circuit court of Escambia County against the defendant to recover the amount due them from the said company, and on March 15th, 1875, the plaintiffs recovered judgement in said court against the said company on their indebtedness for the sum of
54 $14,120.50 and costs; that the said company having been adjudged bankrupt by the U. S. district court for the southern district of New York in the year 1875, its property could not be taken in execution to satisfy said judgement, nevertheless an execution was issued thereon and returned wholly unsatisfied; that the property of said company had been sold by order of the bankrupt court, and its proceeds would not more than pay the costs of the bankrupt proceedings, leaving nothing to be applied to the payment of said judgement or claims of other creditors againt said company; that by the provisions of the said act under which

said company was organized all the stockholders were severally individually liable to the creditors of the corporation to an amount equal to the amount stock held by them respectively for all debts and contracts made by such company until the whole amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made, signed, and sworn to by the president of said company and a majority of its trustees, and recorded in the office of the clerk of the county where the business of said company is carried on, and that said company failed to comply with the said provisions of said act, and did not, by its president and a majority of its trustees, make, sign, swear to, and record said certificate, either in the county of New York, the county in which the operations of said company were by their articles to be carried on, or in the said county of Escambia, in which said company carried on business, or in anywise as required by said act, so as to exempt the defendant from his individual liability. Wherefore, the declaration alleged, the defendant became and was liable to the plaintiffs for the said debt and contract made by the said company, and plaintiffs asked judgement accordingly.

The defendant demurred to the declaration—

First. Because it did not set forth any cause of action.

55 Second. Because it did not set forth any cause of action cognizable by said court.

The demurrer was sustained, and the cause dismissed; thereupon it was taken by writ of error to the supreme court of the State of Florida, by which the judgement of the State circuit court on the demurrer was reversed, and the cause remanded for further proceedings.

The defendant thereupon filed pleas in substance as follows:

First. That the law under which said company was organized declared that no stockholder should be individually liable for the debts of the company unless a suit for the collection thereof should be brought against the company within one year after the debt shall have become due, and that no suit against said company for the debt mentioned in the declaration had been brought in the State of New York, although more than a year had elapsed since it became due.

Second. That the said company was organized on December 8th, 1865, under the law of the State of New York referred to in the declaration; that all its capital stock was paid up within a year after its organization; that defendant did not become a stockholder until April 18th, 1872, and that the provision of said law in reference to the making and filing of the certificate of the payment of stock mentioned in the declaration had no application to defendant, or any other, except those who were such within two years after the date of the organization of said company.

Third. That the original capital stock of said company was $75,000, all of which had been paid up in full; that defendant was the holder and owner of one-fourth thereof, to wit, $18,750, and that he had paid debts of said company over and above that sum.

56 Fourth. That the defendant did not become a stockholder in said company until five years after the lapse of the period of two years and thirty days from the organization thereof, within which last-named period said certificate of the payment of the capital stock of said company should have been filed, and, therefore, the plaintiffs are barred of any action against defendant based on an omission to file said certificate.

Fifth. That the laws of the State of New York under which said company was organized declared that no stockholder thereof should be individually liable for the payment of any debt of said company until an execution therefor issued against said company by a court of the State of New York had been returned unsatisfied, and that no such execution had ever been issued by a court of the State of New York and returned unsatisfied.

The plaintiffs demurred to the first and second and fourth and fifth pleas, and replied to the third plea as follows:

That before the making of the contracts and the contraction of the indebtedness by said company, to wit, in January, 1874, increased its capital stock from 75,000 to $300,000, of which latter amount of stock the defendant was the holder and owner of $75,000, and defendant has not paid the debts of said company to an amount equal to said last-named sum.

After the filing of the above-mentioned pleadings the cause was, on the petition of the defendant, removed to this court, and afterwards the defendant filed a further sixth plea, in which he alleged:

That a large amount of debts, beside those named in the plaintiffs' declaration, was due to other creditors of the said company, exceeding the defendant's ability to pay.

The defendant also filed a rejoinder to the replication of the plaintiffs to defendant's third plea to the effect following:

That upon an increase of the stock of any company organized
57 under the said law of the State of New York referred to in the declaration, the only certificate required to be made and filed in the office of the county clerk was one showing the proceedings of the meeting of stockholders to effect such increase, the amount of capital stock paid in, the business to which such corporation is extended or changed, the whole amount of debts or liabilities of the company, and the amount to or by which the capital stock should be increased or diminished, made out, signed, and verified by the affidavit of the chairman and countersigned by the secretary, and acknowledged by the chairman, and that such certificate was made and filed as required by the said statute in the office of the county clerk of the county of New York, in the State of New York, and also in the office of the secretary of state of the State of New York, and that the full amount of said increased stock was afterwards fully paid up, and that said increase in the stock was made and the additional stock fully paid up before said company incurred the debts to said plaintiffs in their declaration mentioned, and that it appeared in and by said certificate, and was the fact, that all the original capital stock of said company, to wit, $75,000 was fully paid up.

To the defendant's further (sixth) plea, and to the rejoinder to the plaintiffs' replication to the defendant's third plea, the plaintiffs demurred.

The cause was heard upon the sufficiency of the declaration and of the several pleas demurred to, and upon the plaintiffs' demurrer to the rejoinder of the defendant—Mr. E. A. Perry for plaintiffs. Mr. R. L. Camp-
58 bell for defendant. Woods, circuit judge.

The case was removed to this court under the provisions of the act of Congress of March 3d, 1875 (18 Stat., 170). The sixth section of the act declares, "that the circuit court of the United States shall in all suits removed under the provisions of this act proceed therein as if the

suit had been originally commenced in said circuit court, and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said State court prior to its removal."

The case is thereupon to be treated here just as if this court had overruled the defendant's demurrer to the declaration and the defendant had pleaded over and the subsequent pleadings above mentioned had been filed.

In such a case would this court be inexorably bound by its judgement on the demurrer to the declaration, even though it should be afterwards convinced that the declaration was bad and that the demurrer to it should have been sustained? I think not. The court, while the parties are making up the issues, could retrace its steps either by setting aside its decission overruling the demurrer or by allowing the sufficiency of the declaration to be again questioned on the demurrer to the pleas, and giving such judgement as in its opinion the law of the case required.

A bad plea is good enough for a bad declaration, and applying the rule that upon demurrer judgement will be given against the party who has committed the first fault in pleadings, I shall consider the question of the sufficiency of the declaration as still open.

The defendant demurs to the declaration because it does not set forth a cause of action cognizable by this court, and alleges that the suit
59 is to enforce against the defendant a penalty enacted by the law of the State of New York.

The provisions of the law of New York on which the action is based are the 10th and 11th sections of the act authorizing the formation of corporations for manufacturing, &c., purposes, passed February 17th, 1848.

Section ten declares "all the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company, shall have been paid in and a certificate thereof shall have been made and recorded as prescribed in the following section, and the capital stock so fixed and limited shall all be paid in, one half thereof within one year and the other half thereof within two years from the incorporation of said company, or such corporation shall be dissolved."

Section eleven provides that "the president and a majority of the trustees, within thirty days after the payment of the last installment of stock so fixed and limited by the company, shall make a certificate stating the amount of the capital stock so fixed and paid in, which certificate shall be signed and sworn to by the president and a majority of the trustees, and they shall within the said thirty days record the same in the office of the county clerk of the county wherein the business of the said company is carried on."

Section twenty four declares "no stockholder shall be personally liable for the payment of any debt contracted by any company formed under the act which is not to be paid within one year from the time the debt
60 is contracted, nor unless a suit for the collection of such debt shall be brought against said company within one year after the debt shall become due, and no suit shall be brought against any stockholder until an execution against the company shall have been returned unsatisfied in whole or in part."

It is well settled by the authorities, and is not in fact controverted by the plaintiffs, that when the statute creating the liability of a stockholder is penal in its nature it will not be enforced outside the sovereignty creating it.

Derrickson v. Smith, 27 N. J. (law), 166; First National Bank v. Price, 33 Md., 487; Halsey v. McLean, 12 Allen, 538; Gales v. Eastman, 7 Md., 14; Scoville v. Canfield, 14 Johns., 338; Ogden v. Folliott, 3 Tenn. Rep., 733; the State v. John, 5 Ohio, 217; Cable v. McCune, 26 Mo., 371; Lawler v. Burt, 7 Ohio St., 341.

The question to be solved is therefore reduced to this: Are the provisions of the act of the State of New York above quoted penal in their nature?

The liability imposed upon stockholders is not a general liability for all the debts of the corporation. Each stockholder remains liable in certain contingency for the debts of the company to an amount equal to the amount of stock held by him, and this liability may be discharged by the payment to a creditor of the company on his debt of a sum equal to the par value of the stock held by the stockholder.

The stockholders are therefore not liable as copartners, and it has been so held in New York. Woodruff and Beach Iron Works v. Chittenden, 4 Bosw., 417.

To preclude the statute from being enforced in a foreign jurisdiction, it is not necessary that it should be penal in form; it is sufficient if it is penal in its nature. It is the substance which is to be considered.

61 The plain meaning of the section is that unless the capital stock is paid and the certificate thereof is made, sworn to, and filed for record by the officers of the company within the period named in the statute, the stockholders shall be individually liable within the limits prescribed.

The complaint here is not that the stock was not punctually paid up, but that the certificate of payment was not made and filed as required by the law.

The liability, in my judgement, is clearly in the nature of a penalty, and is not an obligation founded on contract.

As well argued by counsel for defendant, an obligation founded on contract which could be satisfied without the consent or default of the obligee, and without payment or other benefit to him, by the act not of the obligor but of a third party, would be a strange anomaly.

It has been settled by numerous decisions that where a statute enjoins a duty to be performed by the officers of a corporation, and in case of a failure on their part to perform that duty makes them individually liable for the debts of the corporation, such liability is in the nature of a penalty. Garrison v. Howe, 17 N. Y., 458; Andrews v. Murray, 33 Barb., 354; Shaler and Hall Quarry Co. v. Bliss, 34 Barb., 309; Broughton v. Otis, 21 N. Y., 261; Squire v. Brown, 22 How., pr. 45; Halsey v. McLean, 12 Allen, 438; Lawler v. Burt, 7 Ohio St., 341; Derrickson v. Smith, 3 Dutch., 166; The Harrisburg Bank v. Commonwealth, 26 Pa. St., 451.

Here the liability is imposed on the stockholders on account of the failure of the officers of the company to file a certificate. The fact that the liability of the stockholders attaches before the default of the officers of the company to file the certificate required does not make the lia-